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No. • •

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

KATHY M. MASON
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the provisions of Article 52(a)(2) of the Uniform Code of Military Justice Violate the Due Process Clause of the Fifth Amendment by Failing To Provide for a Unanimous Verdict from a Six Member Court?

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

KATHY M. MASON
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Kathy M. Mason respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at ____ M.J. ____ (CMA 1987) (Appendix A). The opinion of the Army Court of Military Review is unreported, CM 448517 (ACMR 1986) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987, affirming petitioner's conviction dated January 17, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V: "No person . . . shall be deprived of liberty or property, without due process of law."

The Uniform Code of Military Justice (hereinafter cited as UCMJ), 18 U.S.C. 801 et. seq. (1984) provides:

> Article 52(a)(2): No person may be convicted of any [offense other than one for which the death penalty is mandatory], except as provided in section 845(b) of this title (Article 45(b) [pursuant to a plea of guilty] or by the concurrence of two-thirds of the members present at the time the vote is taken:

STATEMENT OF THE CASE

Contrary to her pleas, petitioner was found guilty of assaulting a child under sixteen years of age and false swearing, in violation of Articles 128 and 134, UCMJ. She was sentenced to a bad-conduct discharge, confinement for five years and forfeiture of all pay and allowances.[1]

In a pretrial motion, defense counsel moved for the military judge to require a unanimous verdict on findings in petitioner's case (R. 12 and Appellate Exhibit II). The military judge denied the motion (R. 12). After extensive *voir dire*, the military judge sustained challenges against three of the nine court members, leaving six members to decide petitioner's case (R. 91). The court-martial was composed of officer and enlisted members.[2] The constitutional question involved was litigated at trial and at every stage of the appellate process. The issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

WHETHER THE PROVISIONS OF ARTICLE 52(a)(2), UCMJ, VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY FAILING TO PROVIDE FOR A UNANIMOUS VERDICT OF GUILTY FROM A SIX MEMBER COURT.

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[1] The sentence was approved by the convening authority pursuant to Article 60, UCMJ.

[2] Court-martial members function much the same as a civilian jury. They must render a verdict based on the facts presented and the military judge's instructions. Petitioner's case was a general court-martial and therefore required at least five members. Two-thirds of the members must concur in order to arrive at a verdict of guilty. *See* Articles 16, 25, 51 and 52, UCMJ.

REASONS FOR GRANTING THE WRIT

The men and women who serve in the armed forces are entitled to the same due process that is provided civilians unless there is clear evidence that such process would detract from the military's ability to perform its mission. The Court has found a constitutional requirement that six member jury verdicts be unanimous. In order for the American public to maintain confidence in the military justice system it must conform as much as practically possible to constitutional notions of due process. This is especially true in light of the Court of Military Appeals' recent holdings expanding military court-martial jurisdiction.[3] Because courts-martial are not limited to trying military crimes, they should be required to accord the same degree of due process as do other criminal courts when practicable. Petitioner realizes that the military's special mission prevents the use at courts-martial of the identical procedures the federal criminal courts employ.[4] Petitioner submits however, that the government has failed to demonstrate any compelling reasons justifying a less than unanimous verdict from a six member court-martial panel.

I

PETITIONER HAS STANDING TO CLAIM THAT THE PROVISIONS OF ARTICLE 52(a)(2), UCMJ, VIOLATE HER DUE PROCESS RIGHTS.

Article 51(a), UCMJ, requires that the members of a court-martial vote on findings by secret written ballot. The votes are counted by the junior member and checked by the president, who is the senior member. Article 52(a)(2), UCMJ, requires that two-thirds of the members concur in order to render a guilty verdict. *See also Manual for Courts-Martial,*

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[3] *See* United States v. Solorio, 21 M.J. 251 (CMA) *cert. granted* 106 S.Ct 2914 (1986) and United States v. Abell, 23 M.J. 99 (CMA) *cert. petition filed,* 55 USLW 3453 (U.S. Dec. 10, 1986) and cases cited therein.

[4] *See e.g.* Mil.R.Evid. 101 (b)(1) (the rules of evidence generally applied in federal criminal courts will apply at courts-martial unless they conflict with specific provisions of military law).

United States, 1984, Rule for Courts-Martial [hereinafter cited as R.C.M.] 921. "Except as provided in Mil.R.Evid. [Military Rule of Evidence] 606, members may not be questioned about their deliberations and voting." R.C.M. 922(e). Thus, polling the court-martial members is prohibited. As a result, petitioner does not and can not ascertain the numerical composition of the verdict.

The Article and Rule requiring a secret ballot, in effect, insulate Article 52(a)(2), UCMJ, from due process scrutiny. Petitioner submits that the secret ballot provisions were not so intended. Rather, they were intended to shield the court-martial members from unlawful command influence. Congress has long been concerned that court-martial members may be subject to unlawful command influence. *See* Hearings on H.R. 2498 before a Subcommittee of the Committee on Armed Services, 81st Cong. 1st Sess. 628, 640-641, 825-26, and 1075 (1949) and *see also* Report of War Department Advisory Committee on Military Justice, 6-7 (1946) (committee investigated commanders' control of courts-martial during Second World War and concluded that it was necessary to limit commanders' influence of courts-martial members). Legislation designed to protect court-martial members from unlawful command control should not also serve to deny petitioner an opportunity to litigate a question of fundamental due process.

Petitioner's inability to present the numerical composition of the verdict should not result in a lack of standing before the Court. Petitioner asks the Court to presume that petitioner's verdict was less than unanimous and that petitioner suffered prejudice. *Cf. Mendrano v. Smith*, 797 F.2d 1538, 1540 n.1 (10th Cir. 1986) ("Since, as required by the Uniform Code of Military Justice the court-martial voted by secret ballot, our record does not reveal the number of votes for conviction. However, we consider the two-thirds rule's validity because it did apply to this trial and assume only two-thirds, or four members of the court-martial voted for conviction").

II

THE PROVISIONS OF ARTICLE 52(a)(2), UCMJ VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY FAILING TO PROVIDE A UNANIMOUS VERDICT FROM A SIX MEMBER COURT.

A. *Minimum Due Process Requires At Least A Unanimous Six Member Verdict.*

The Due Process Clause requires a unanimous verdict of a six member fact-finding body in any non-petty criminal prosecution. In *Burch v. Louisiana*, 441 U.S. 130, (1979), the Court held that a less than unanimous verdict from a six member jury was unfair and unconstitutional. *Citing, Ballew v. Georgia*, 435 U.S. 223 (1978) (five member jury is unconstitutional *per se*). In *Ballew*, the Court stressed that at "some point, [the] decline in jury size leads to inaccurate fact-finding and the incorrect application of the common sense of the community to the facts." *Ballew*, 435 U.S. at 232. Accordingly, convictions where unanimity is not required of fact-finding bodies composed of fewer than six members are unfair and violate due process.

In *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) the Court stated, "[t]he State's interest in prevailing at trial-unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."[5] The same compelling interest in ensuring accurate findings of fact applies to the parties in courts-martial.

B. *Due Process In The Military Context Does Not Justify Less Than A Unanimous Six Member Verdict.*

The Due Process Clause is applicable to the military. *Burns v. Wilson*, 346 U.S. 137, 142-43 (1953); *United States v. Tempia*, 16 CMA 629, 37 CMR 249 (1967). This requirement may be modified only when special military conditions justify a dif-

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[5] *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (Due Process Clause requires that tribunals foster accurate fact-finding); In re Murchison, 349 U.S. 133 (1955) (a fair trial in a fair tribunal is a basic requirement of due process).

ferent rule than that applied under civilian law. *Kauffman v. Secretary of Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); *Courtney v. Williams*, 1 M.J. 267, 270 (CMA 1976). The government has failed to reconcile its use of the traditional nonunanimous verdict at court-martial[6] with current due process standards.

Current congressional intent is to conform the military justice system to civilian notions of due process and fairness whenever such conformity would not detract from the military's mission. *See generally* Military Justice Act of 1983, Pub.L.No. 98-209, 97 Stat. 1393; Military Justice Act of 1968, Pub.L.No. 90-632, 82 Stat.; *cf. United States v. Remai*, 19 M.J. 229, 233 (CMA 1985) ("[T]he recent enactment of legislation which for the first time subjects courts-martial to direct review by the Supreme Court tends to suggest a congressional intent that the same standards should be applied in the review of a court-martial conviction that would be employed in the review of a civil-court conviction." (footnote omitted)).

Congress has retained enough court-martial provisions[7] designed to support the military in accomplishing its mission

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[6] No special military conditions exist to justify a less than unanimous verdict from a six member court. Article 52 and the other articles of the UCMJ were substantially derived from the Articles of War, August 29, 1874 (39 Stat. 650). Hearings on H.R. 2498, *supra* at 1082. The American Articles of War were substantially derived from the British Articles of War. Winthrop, Military Law and Precedents, (1886) 46-60. The British articles evolved separately from common law and placed primary emphasis on maintaining military discipline as opposed to providing due process. *Id.* at 52-54. The American Articles of War provided that a verdict must reflect the concurrence of a majority of the members in noncapital cases. Articles of War, Article 43. Colonel Winthrop indicates that a majority verdict evolved from the delegation of a sovereign or commander's authority to a board of trusted officers to decide a soldier's criminal culpability. Winthrop at 62-63. The board would report their findings to the sovereign or commander for his approval, modification and implementation in accordance with traditional military decision making procedures. *Id.* at 63. Consequently, courts-martial have traditionally served as an advisory body to the commander, supporting the military commander's need for swift discipline.

[7] Some of these provisions are as follows:

1. Court members are senior in rank to the accused and in practice often consist of commanders and senior enlisted persons Article 25, UCMJ.

2. Court members are selected personally by the convening au-

to negate any perceived need for less than a unanimous verdict. In fact, because morale is a vital element in maintaining discipline, and dependent upon the belief by soldiers that they are being treated "fairly", the nonunanimous verdict may cause lower morale and detract from the military's ability to perform its mission.

The argument that a unanimous verdict from a court consisting of six members will require more deliberation time and may result in "hung juries," thereby slowing the court-martial process, was rejected in *United States v. Burch*:

> Undoubtedly, the state has a substantial interest in reducing the time and expense associated with the administration of its system of criminal justice. But that interest cannot prevail here. First, on this record, any benefits that might have accrued by allowing five members of a six person jury to render a verdict, as compared with requiring unanimity of a six member jury, are speculative at best. More importantly, we think that

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thority who exercises command over them and to whom the court members must look for career advancement. Article 25(d)(2), UCMJ.

3. The convening authority utilizes the criteria in Article 25(d)(2), UCMJ, and selects only those persons, who, in his discretion, are best qualified to serve as court members by reason of age, education, training, length of service and judicial temperament.

4. The trial judges and first level of appellate judges are career military officer/lawyers who are not afforded Article III, Constitution, protections with respect to salary and tenure, yet decide issues involving the constitutionality of Congressional acts as they relate to federal criminal proceedings. *See* Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J., 1984.

5. Military courts when composed of officers are college-educated, and stand as a virtual blue ribbon fact-finding body, in stark contrast to the usual composition of civilian juries.

6. The convening authority wields enormous discretionary power within the military justice system, which includes, but is not limited to, the decision to refer a case to court-martial, production of witnesses, acts of clemency, and disapproval of the findings and/or sentence for any reason at all. Articles 22, 25, 53, and 60, UCMJ.

7. The members can ask questions of the witnesses. Mil.R.Evid. 614.

8. Both the prosecution and defense are afforded only one peremptory challenge even in capital cases. Articles 41, UCMJ.

> when a state has reduced the size of its juries to the minimum number of jurors permitted by the constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the state should yield.

441 U.S. at 139.

C. *All Judicial Fact-Finding Bodies, Regardless Of Their Legal Origin, Must Conform To Constitutional Standards.*

Fact-finding bodies have been recognized as important barriers against governmental oppression. *Singer v. United States*, 380 U.S. 24 (1965). They provide an essential safeguard against overzealous prosecutors and a biased or unfair judge. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Because Congress has guaranteed soldiers the right to a trial with a fact-finding body pursuant to Article 16, UCMJ, those procedures must be fair and in accordance with due process and Constitutional standards. *See McKeiver v. Pennsylvania*, 403 U.S. at 543.

Petitioner is cognizant of recent military court decisions rejecting the proposition that unanimous verdicts are required in the military. *United States v. Neely*, 21 M.J. 606 (AFCMR 1985), *United States v. Seivers*, 9 M.J. 612 (ACMR 1980), *United States v. Guilford*, 8 M.J. 598 (ACMR 1979) *pet. denied* 8 M.J. 242 (CMA 1980) and *United States v. Corl*, 6 M.J. 914, *aff'd on other grounds* 8 M.J. 47 (CMA 1979). Nevertheless, petitioner submits the instant case requires consideration for the following reasons. First, the facts of petitioner's case are extremely similar to those in *Burch v. Louisiana*, and therefore demand judicial reconciliation.

Secondly, Congress' recent decision to place military tribunals directly under Supreme Court scrutiny[8] is a clear signal that Congress intends military courts to parallel civilian courts unless military necessity dictates to the contrary.[9] *See also Kauffman v. Secretary of the Air Force*, 415

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[8] Military Justice Act of 1983, *supra*.

[9] United States v. Remai, 19 M.J. 229, 233 (CMA 1985).

F.2d 991, (courts-martial may only vary from civilian standards of due process because of special military conditions).

Lastly, the implication of the holdings of *Corl* and *Guilford* is that a two-thirds majority verdict from a five member military court is equal to, in terms of due process, the six member unanimous civilian verdict required by *Ballew* and *Burch*. The Courts of Military Review justify such speculation by the fact that military courts are "blue ribbon" fact-finders. *Corl*, 6 M.J. at 915 and *Guilford*, 8 M.J. at 602. The logic is questionable at best. If military fact-finders possess greater fact-finding expertise than civilian jurors, then anything less than a unanimous verdict must be considered suspect. The logic of *Corl* and *Guilford* dictates that the opinion of one dissenting "blue ribbon" military fact-finder must be given *more credence* than the dissenting opinion of one civilian venireman who was chosen "without reference to qualifying standards." *Corl*, 6 M.J. at 916.

D. *Statistical Studies And Data Considered By The Court In Burch and Ballew Must Not Be Summarily Dismissed Without Justification In The Military Context.*

In *Ballew* the Court considered volumes of data indicating that small juries are less likely to foster effective group deliberations, are more likely to render inconsistent verdicts, create minorities of one of two people who become less likely to follow their convictions because of peer pressure, and lessen meaningful "community" participation during the deliberation process. *Id.* 435 U.S. at 232-237. The data convinced the Court that the Constitution requires a six-member unanimous jury verdict in a non-petty offense. *Burch*, 435 U.S. at 138, *citing Ballew*. There exists no military exigency that justifies military courts' refusal to consider and follow the same data. Indeed, one of the primary experts in the field of juries and small group interactions relied on by the Court in *Burch* and *Ballew* stated, regarding military panels/juries that, "the same principles [of group decision making] would apply to the military as to civilian decision makers," and "[in] other areas of research, only negligible or no differences have

been found between civilian and military populations." Saks, Michael, J., Department of Psychology, Boston College, Letter to Captain Richard J. Anderson, Defense Appellate Division, U.S. Army Legal Services Agency (Appendix C).

III

IN LIGHT OF THE COURT OF MILITARY APPEALS' RECENT DECISIONS EXPANDING COURT-MARTIAL JURISDICTION, COURTS-MARTIAL MUST PROVIDE MINIMUM DUE PROCESS.

In the last decade, the United States Court of Military Appeals has expanded court-martial jurisdiction over many offenses which had previously been tried in civilian courts. *Compare United States v. Solorio*, 21 M.J. 251 (CMA) *cert. granted* 106 S.Ct. 2914 (1986)[10] (military jurisdiction found over off-post sex offenses against daughters of fellow servicemen) with *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969) (court found no military jurisdiction over off-post sex offenses against a daughter of a fellow serviceman).

The traditional justification for the military's streamlined criminal justice system was that its primary purpose was to preserve military discipline and that it would only be used to prosecute military crimes that were "service connected." *O'Callahan v. Parker*, 395 U.S. 258 (1969). While the *O'Callahan* Court acknowledged that specialized military courts were necessary, it concluded that since these courts necessarily denied certain fundamental constitutional rights they must be limited in scope to "*the least possible power adequate to be end proposed.*" *Id.* at 265, *quoting Toth v. Quarles*, 350 U.S. 11, 23 (1955), *quoting Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 231 (1821) (emphasis supplied by *Toth* Court). In light of the expanded scope of court-martial jurisdiction it is imperative that the fundamental constitutional rights of the military accused be staunchly protected.

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[10] *See also* United States v. Abell, 23 M.J. 99 (CMA) *cert. petition filed* 55 USLW 3453 (U.S. Dec. 10, 1986) (No. 86-953), United States v. Lockwood, 15 M.J. 1 (CMA 1983) and United States v. Trottier, 9 M.J. 337 (CMA 1980).

The military's mission of defending this country is clearly a compelling state interest. Petitioner's interest in receiving a fair trial resulting in accurate findings of fact is also compelling. *Cf. Ake v. Oklahoma*, 470 U.S. 79. There has been no showing that compliance with the basic due process rights expressed in *Burch* will in anyway be deleterious to the national defense. The perception of fairness and accurate verdicts can only enhance the morale and effectiveness of men and women in our armed forces. Thus, the two interests are neither inconsistent, nor mutually exclusive and can coexist to promote an effective fighting force and maintain the constitutional rights of its soldiers.

Conclusion

Anything less than a minimum requirement for a unanimous six member verdict clearly thwarts constitutional due process provided accused in military trials. Soldiers, in the absence of a clear showing that a compelling national interest requires otherwise, are entitled to the same accuracy from fact-finders in criminal trials as are all other United States citizens.

Respectfully submitted,

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APPENDICIES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 56524/AR
CMR Dkt. No. 448517

UNITED STATES, APPELLEE,

v.

KATHY M. MASON (147-60-4515), APPELLANT.

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it appears that appellant's court-martial was properly constituted and its verdict rendered in accordance with Articles 1-134, Uniform Code of Military Justice, 10 U.S.C. §§ 801-934, respectively. Accordingly, it is by the Court this 8th day of April, 1987,

ORDERED:

That said petition is granted on the issue raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.*

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

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* *See Mendrano v. Smith*, 797 F.2d 1538 (10th Cir. 1986).

COX, Judge (dissenting):

I believe the issue raised in the petition is without merit. Accordingly, I dissent from granting it. If it may have any merit, then we should grant, require briefs, and have oral argument before deciding the issue.

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (HANCOCK)
Appellate Government Counsel (HERRINGTON)

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

CM 448517
3d Armored Division

UNITED STATES, APPELLEE,

v.

PRIVATE E1 KATHY M. MASON, 147-60-4515,
UNITED STATES ARMY, APPELLANT

Before DeFORD, WILLIAMS, and KENNETT Appellate Military Judges

J. P. Hug, Military Judge

15 October 1986

For Appellant: Major Stephen R. Dooley, JAGC, Major Joel D. Miller, JAGC, Captain Scott A. Hancock, JAGC (on brief).

For Appellee: Colonel Norman G. Cooper, JAGC, Lieutenant Colonel Gary, F. Roberson, JAGC, Major Robert L. Swann, JAGC, Captain Thomas L. Herrington, JAGC (on brief).

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ WILLIAM G. STOKES
William G. Stokes
Captain, JAGC
Chief Deputy Clerk of Court

APPENDIX C

From: Michael J. Saks, Ph.D., Department of Psychology, Boston College, Chestnut Hill, Massachusetts 02167

To: Captain Richard J. Anderson, Defense Appellate Division, U.S. Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041

Subj: Size of judicial decision-making body in military trials

Ref:
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(f) Saks, M.J., and Hastie, R., Social Psychology in Court. New York: Van Nostrand Reinhold (1978).
(g) Stouffer et al., *The American Soldier.* (Part of series, Studies in social psychology in World War II). Princeton, N.J.: Princeton University Press (1949).
(h) Zeisel, H., ". . . And then there were none:" The Diminution of the Federal Jury. 38 *U.Ch.L.Rev* 710-724 (1971).
(i) Figure 1 (attached).

1. As I understand the issue, it is that the research findings on group decision-making as a function of group size which were adverted to by the U.S. Supreme Court in *Ballew*

v. Georgia are thought by some not to apply to military populations. To my knowledge, none of the studies that have been conducted on the question employed military populations. I think, however, that in the absence of such direct studies, the most defensible conclusion is that the same principles would apply to military as to civilian decision-makers. In the paragraphs below I present the general rationale and evidence that lead me to believe this. Let me apologize in advance for any misstatements I might make regarding particulars of procedures in military courts, with which I am unfamiliar. My expertise goes only to the effects of size on group behavior.

a. In the 1940's and 50's a substantial portion of social psychological research on small group behavior was done in, by and for the military. Summaries of much of this work may be found in Hare (1976), McGrath and Altman (1966), and the famous series by Stouffer et al. (1949) on *The American Soldier*. Virtually all of the social psychological phenomena observed among civilians – including principles of attitude change, group influence, leadership, and decision-making – were found to hold among military personnel as well. In particular, it has been repeatedly found, contrary to popular belief, that the composition of a group (that is, the age, education, and other demographic characteristics of group members) bear little or, usually, no relation to the performance of the group's task (e.g., McGrath and Altman, 1966, p. 106-107; Havron et al., 1952; Saks, 1976; Saks and Hastie, 1978). (What can make a difference are specific technical skills required by the task; in the jury situation this is rarely a problem).

b. Most of the variables of interest to the Court in *Ballew* are especially unlikely to behave differently with the use of different populations. Some are strictly statistical phenomena, where it matters not whether the group members are military, civilian, or even whether they are people. That is, the ability of groups of varying sizes to provide cross-sectional representation of the community from which they are drawn depends only upon the distribution of objects (people, marbles, cars, anything) in the population and the

size of the sample. Similarly, one of the major virtues of a group over individuals is its ability to bring together diverse intellectual and experiential resources. That ability grows with the group's size (although with each additional member each incremental improvement is less than the one that preceded it). Further, there is no obvious reason to think that if larger groups lend themselves to greater resistance of group members to conformity pressures by the majority or promote group deliberation, the population from which the group is drawn will alter these general phenomena (see Zeisel, 1971; Saks, 1977).

c. To say simply that one population is different from another and therefore the findings from one do not generalize to the other is a misleading oversimplification. If a functional relationship is found among population A between size and, say rate of conviction, even a finding that population B convicts at a different rate than population A does not negate the functional relationship. Only "interactions" of particular sorts could do that. This is illustrated in Figure 1a, where the two different populations show a difference in conviction rates, but their pattern of response to jury size changes is the same. The suggestion that the findings from one population do not apply to another really implies the relationships shown in Figures 1b and 1c. Here, the relation between size and convictions found in population A either does not hold for population B or is reversed. Without evidence we cannot be certain, but that such a "statistical interaction" obtains in the switch from civilian to military populations seems highly unlikely.

d. In trying to think of some differences that may exist among military populations that could produce such differences, two possibilities occur to me. One is the hierarchical relationship that exists among military personnel. The second is the existence of a likelihood of future interaction among "jury" members. It may be, for example, that due to the influence of higher ranking members, other members of the decision-making body play no independent role, and in essence rubber stamp the preference of the highest authority. I have no way of knowing if this is the case, but it

would make the size of the body far less important. This difference is not one of demographics of the military population, but the social structure within which they operate. The suggestion in this paragraph is highly speculative. The point of making it is chiefly to indicate that those who think the difference in populations makes a difference ought to specify just what they believe to be the critical element(s), and offer evidence that take us beyond speculation.

2. In summary, while I am aware of no direct tests of the question at hand that have been conducted on military populations, it is highly unlikely that that would be a difference that makes any difference. The steps of inference in reaching this conclusion are small ones. In other areas of research, only negligible or no differences have been found between civilian and military populations. There is no apparent reason why the same should not be true in regard to the variable of group size. Moreover, some of the phenomena adverted to in *Ballew* are statistical and have nothing to do with the social characteristics of the population from which a jury is drawn.

Sincerely yours,

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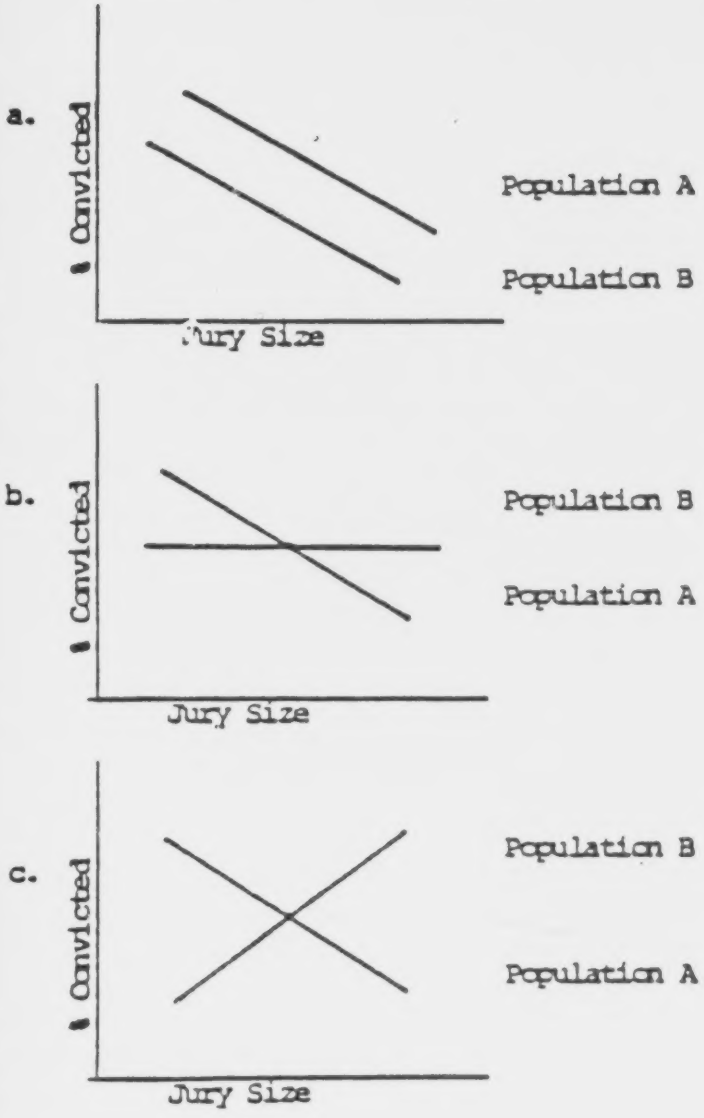
FIGURE 1. Possible relationships between jury size and conviction rates in two different populations.



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